(21)

No. 04-1152

FILED
SEP 20 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICI CURIAE OF 56 COLUMBIA LAW SCHOOL FACULTY MEMBERS IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

[Individual Amici Listed On Inside Cover]

JONATHAN D. SCHILLER
Counsel of Record
DAVID A. BARRETT
GARY K. HARRIS
WILLIAM C. JACKSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015
(202) 237-2727

Counsel for Amici Curiae

SEPTEMBER 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

JOSÉ E. ALVAREZ
MARK BARENBERG
VIVIAN BERGER
GEORGE A. BERMANN
BARBARA ARONSTEIN BLACK
VINCENT A. BLASI
LEE C. BOLLINGER
MARVIN A. CHIRELSTEIN
KIMBERLE WILLIAMS CRENSHAW
LORI FISLER DAMROSCH
MICHAEL C. DORF
MICHAEL W. DOYLE
ARIELA R. DUBLER
HAROLD S. H. EDGAR
ELIZABETH EMENS
CYNTHIA ESTLUND
JEFFREY A. FAGAN
ROBERT A. FERGUSON
GEORGE P. FLETCHER
KATHERINE M. FRANKE
PHILIP GENTY
HARVEY J. GOLDSCHMID
JEFFREY N. GORDON
FRANK P. GRAD
KENT GREENAWALT
JACK GREENBERG
MICHAEL A. HELLER
LOUIS HENKIN
JAMES HOOVER
CONRAD JOHNSON
AVERY W. KATZ
BENJAMIN L. LIEBMAN
CAROL B. LIEBMAN
JAMES S. LIEBMAN
EDWARD LLOYD
GILLIAN METZGER
EBEN MOGLEN
SUBHA NARASIMHAN
GERALD L. NEUMAN
KATHARINA PISTOR
ANDRZEJ RAPACZYNSKI
PETER ROSENBLUM
CHARLES F. SABEL
WILLIAM M. SAGE
CAROL SANGER
BARBARA A. SCHATZ
CATHERINE M. SHARKEY
WILLIAM H. SIMON
MICHAEL I. SOVERN
JANE M. SPINAK
PETER L. STRAUSS
SUSAN P. STURM
KENDALL THOMAS
PATRICIA J. WILLIAMS
JOHN FABIAN WITT
MARY MARSH ZULACK

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE SOLOMON AMENDMENT DOES NOT PROHIBIT THE PROVISION OF FEDERAL FUNDING TO INSTITUTIONS OF HIGHER EDUCATION WHOSE RECRUITING POLICIES PROVIDE ACCESS TO MILITARY RECRUITERS ON THE SAME TERMS AS ALL OTHER EMPLOYERS	6
A. The Solomon Amendment Does Not Prohibit Federal Funding to Institutions Whose Policies and Practices Treat the Military Identically to All Other Employers	6
B. The History of the Solomon Amendment Supports the Interpretation that the Statute Was Not Intended to Apply to Evenhanded Policies and Practices	15
II. THE INTERPRETATION OF THE STATUTE OFFERED BY THE DEPARTMENTS OF THE MILITARY IS NOT ENTITLED TO DEFERENCE	20
III. THE CANON OF CONSTITUTIONAL AVOIDANCE COUNSELS IN FAVOR OF CONSTRUING THE STATUTE SO AS NOT TO PASS ON A QUESTION OF CONSTITUTIONALITY	23
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) 23

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 8

Barnhart v. Thomas, 540 U.S. 20 (2003) 20

BedRoc Ltd., LLC v. United States, 541 U.S. 176 (2004) 6

Bennett v. Spear, 520 U.S. 154 (1997) 12

Bryan v. United States, 524 U.S. 184 (1998) 19

Burt v. Rumsfeld, 354 F. Supp. 2d 156 (D. Conn. 2005) ..... *passim*

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 20

Christensen v. Harris County, 529 U.S. 576 (2000) 21

Clark v. Martinez, ___ U.S. ___, 125 S. Ct. 716 (2005) 23, 24

Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) 6

Crowell v. Benson, 285 U.S. 22 (1932) 23

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 24

Exxon Mobil Corp. v. Allapattah Servs., Inc., ___ U.S. ___, 125 S. Ct. 2611 (2005) 15, 16

FDA v. Brown & Williamson Tobacco, 529 U.S. 120 (2000) 14

Forum for Academic and Institutional Rights v. Rumsfeld, 291 F. Supp. 2d 269 (D.N.J. 2003) 9, 22

TABLE OF AUTHORITIES – Continued

Page

Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) ..... *passim*

Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) 20, 21

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 19

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 6

Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) 8

Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000) 9

Jean v. Nelson, 472 U.S. 846 (1985) 5, 23

Lamie v. United States Tr., 540 U.S. 526 (2004) 15

Leocal v. Ashcroft, ___ U.S. ___, 125 S. Ct. 377 (2004) 12

MCI Telecomms. Corp. v. N.Y. Tel. Co., 134 F. Supp. 2d 490 (N.D.N.Y. 2001) 9

NLRB v. Fruit Packers, 377 U.S. 58 (1964) 19

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 15

Premier Elec. Constr. Co. v. Nat'l Elec. Contractors' Ass'n, 814 F.2d 358 (7th Cir. 1987) 10, 11

Rubin v. United States, 449 U.S. 424 (1981) 6

Rust v. Sullivan, 500 U.S. 173 (1991) 23, 24

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 19

Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988) 19

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Smith v. United States, 508 U.S. 223 (1993) 12

Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1944) 5, 23

United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 24

United States v. Mead Corp., 533 U.S. 218 (2001) 21

United States v. Menasche, 348 U.S. 528 (1955) 12

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) 9

Washington v. Davis, 426 U.S. 229 (1976) 15

Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 14

STATUTES AND REGULATIONS

10 U.S.C. § 983 ..... *passim*

47 U.S.C. § 251 8

National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373 16

National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337 16-17

32 C.F.R. § 216.4 ..... 8, 9, 17

Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 63 Fed. Reg. (1998):
p. 56,820 ..... 17, 19
p. 56,823 17-18
p. 56,824 18

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

140 Cong. Rec. (daily ed. May 23, 1994):
p. H3861 16
p. H3862 16
p. H3863 16

150 Cong. Rec. (daily ed. Mar. 30, 2004):
p. H1707 19
p. H1708 19
p. H1710 19
p. H1711 19

S. Rep. No. 260, 108th Cong., 2d Sess. (2004) 18

OTHER AUTHORITIES

American Heritage College Dictionary 825 (3d ed. 1993) 11

John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001) 12

9 Oxford English Dictionary 323-24 (2d ed. 1989) 11

Webster's Third New International Dictionary of the English Language Unabridged 1376 (1993) 11

BRIEF AMICI CURIAE OF 56 COLUMBIA LAW SCHOOL FACULTY MEMBERS IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICI CURIAE

Amici curiae are individual members of the faculty of the Law School at Columbia University.[1] As faculty members, Amici have undertaken to provide students of Columbia Law School ("Columbia Law School," "Law School" or "School") with an education in the study and practice of law at the highest level of intellectual challenge and accomplishment. As part of that mission, the Law School faculty has adopted policies that span a wide variety of topics, from curriculum choices, to graduation qualifications, to recruitment policies, to more mundane issues.

The Law School has long sought to facilitate structured contact between its students and prospective employers, both on and off campus. This structured contact is beneficial to both groups. Law School students are provided with the opportunity to learn about and consider employment in diverse areas of practice. Similarly, employers are given the opportunity to agree to participate in

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, Amici state that no counsel for a party has written this brief in whole or in part and that no other person or entity, other than Amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Lee C. Bollinger, President of Columbia University, appears in this proceeding in his capacity as a Professor of Law. Michael A. Heller, a member of the Law School administration, appears in this proceeding in his capacity as a Professor of Law.

the employment recruiting programs sponsored by the School so that, in a fair and efficient manner, they can meet and evaluate the School's students.

In this regard, Columbia Law School has adopted various policies and procedures with which both its students and all employers seeking the assistance of the School's Office of Career Services ("OCS") must comply. Consistent with the School's educational mission, these policies are designed to give fair and equal treatment to each student and prospective employer, to minimize academic disruption, and to protect student privacy. For example, all students and employers participating in the Law School's Early Interview Program do so on one or more of five days in mid-August set annually by the Law School. Interviews are scheduled pursuant to a bid/lottery system, in which a computer program schedules interviews according to student interest until an employer's schedule is filled. *See* www.law.columbia.edu/careers/career_services/employers/Hiring_Informat/Interview_Progr. In order to ensure the integrity of its bid/lottery system, the Law School requires that all participating employers agree not to pre-screen interested students and not to engage in unsolicited direct contact with students. *Id.* The Law School's universally applicable policies further require that participating employers hold open any offers extended to the School's students until dates specified by OCS. *Id.*

As part of its universally applicable recruitment policies, Columbia Law School also requires that any employer participating in School-sponsored recruiting programs or receiving recruiting assistance from OCS provide an assurance that the employer does not discriminate on certain bases, including race, color, religion,

national origin, sex, age, handicap or disability, and sexual orientation. *Id.* This long-standing nondiscrimination policy is Columbia Law School's corollary to the nondiscrimination policy adopted by the American Association of Law Schools in 1990. *See Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224-25 (3d Cir. 2004); J.A. 251.

Columbia Law School's nondiscrimination policy, by its words and by the School's practices, applies equally to each and every employer seeking recruitment assistance at the School. No non-military employer is excepted from this policy. Hundreds of employers, spanning the spectrum of private, public and public interest entities, including leading law firms, U.S. Attorneys' Offices, Public Defender Offices, the Federal Bureau of Investigation, the Central Intelligence Agency, the Office of the Comptroller of the Currency, the State Department Office of Legal Advisor, and the House of Representatives Office of the Legislative Counsel have all availed themselves of the School's OCS services by complying with the Law School's evenhanded policies.[2]

None of the School's policies, including its nondiscrimination policy, singles out military recruiters, and there has been no effort in practice to apply the nondiscrimination policy to the military in any manner other

[2] As at other law schools, *see* J.A. 33, 75-76, non-participating employers and Columbia Law School students remain free to contact each other in any manner they choose, using means of recruitment outside OCS-sponsored recruiting activities and processes. Military recruiters, for example, have been provided special interview facilities on Columbia University's campus, with notices of such interviews circulated and posted by the Law School.

than how it has been applied to every other employer. Despite this equal treatment of all employers, the United States Air Force notified Columbia Law School on May 29, 2002 that it was not in compliance with the Solomon Amendment. Other law schools received substantially identical notifications from the military. *See, e.g.*, J.A. 111-12 (Letter from Clyde J. Tate II, Chief, Personnel, Plans, and Training Office, United States Army, to Richard C. Levin, President, Yale University, dated May 29, 2002); J.A. 128-33 (Letter from William J. Carr, Acting Deputy Under Secretary of Defense, to Mr. Levin, dated May 29, 2003). The military demanded that the Law School waive as to military recruiters the School's otherwise universally applicable nondiscrimination policies. Rather than jeopardize federally funded programs at Columbia University, including various science and technology programs, the Law School agreed to waive its nondiscrimination policy as to military recruiters.

Amici seek to file this brief because they believe that evenhanded application of universally applicable recruitment policies such as those adopted at Columbia Law School satisfies the Solomon Amendment's requirement as currently written that institutions receiving federal funds permit the military to "gain[] access" to campuses and to students on campuses "for purposes of military recruiting *in a manner that is at least equal in quality and scope* to the access . . . that is provided to any other employer." 10 U.S.C. § 983(b)(1) (2005) (emphasis added). Amici respectfully urge that this Court apply the Solomon Amendment as it is written and affirm the judgment below, without reaching the constitutional issues that have been argued by the parties.

SUMMARY OF ARGUMENT

"'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). The Court here can avoid passing on the constitutional questions presented by the parties by applying the Solomon Amendment as it is written, and determining that the text of the Solomon Amendment does not bar federal funding for institutions of higher education that have adopted and evenhandedly applied to all employers policies prohibiting discrimination by organizations participating in institutionally-sponsored recruiting programs.

Pursuant to the provisions of the Solomon Amendment, no specified funds may be provided to an institution of higher education if that institution bars the military from "gaining access" for "recruiting in a manner that is at least equal in quality and scope" to the access provided to "any other employer." 10 U.S.C. § 983(b)(1) (2005). The only reasonable construction of the statute is one that permits federal funding to institutions of higher education whose universally applicable policies do not single out the military for gaining access to campuses and students on less favorable terms than the terms provided to other employers. Because nondiscrimination policies applicable and evenhandedly applied to all employers do not trigger the provisions of the Solomon Amendment, this Court should affirm the issuance of the preliminary injunction by the court below.

ARGUMENT

I. THE SOLOMON AMENDMENT DOES NOT PROHIBIT THE PROVISION OF FEDERAL FUNDING TO INSTITUTIONS OF HIGHER EDUCATION WHOSE RECRUITING POLICIES PROVIDE ACCESS TO MILITARY RECRUITERS ON THE SAME TERMS AS ALL OTHER EMPLOYERS

A. The Solomon Amendment Does Not Prohibit Federal Funding to Institutions Whose Policies and Practices Treat the Military Identically to All Other Employers

In determining the scope of a statute, the Court "begin[s] with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)); *accord, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion). Where, as here, "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The current version of the Solomon Amendment provides in pertinent part:

> (b) .... No funds ... may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of

> when implemented) that either prohibits, or in effect prevents –
>
> > (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; . . . .

10 U.S.C. § 983(b)(1) (2005).

The text and structure of this statute are clear, and the statute's command is narrowly targeted. To be eligible for certain specified federal funding, an institution may not, through a policy or practice, treat military recruiters less favorably than the institution treats other employers. In the precise words of the statute, federal funding is conditioned upon military recruiters "gaining access . . . in a manner that is at least equal in quality and scope to the access . . . that is provided to any other employer." *Id.* The sole requirement is equality in the "manner" by which military and non-military recruiters may "gain[] access." Conversely, nothing in the statute requires that military recruiters be afforded especially favorable treatment or be exempted from evenhanded application of institutional policies.

The Solomon Amendment as it is currently written prohibits the provision of specified federal funds to an institution whose recruiting policies and practices single out the military for unfavorable treatment. For example, an institution would not remain eligible for the specified funding if it had a policy that singled out military recruiters and barred them from entering its campus, but did not

likewise bar all other employers. *See* 32 C.F.R. § 216.4(c)(3) (2005). Similarly, if an institution's practice were to require military recruiters to conduct interviews only during July, but the institution allowed other employers to conduct interviews at any time during the school year, such "practice" would "in effect prevent[]" the military from gaining access to campuses and students "in a manner" equal to other employers. The Solomon Amendment would therefore prohibit the provision of the specified funding.

This same reading of the text of the Solomon Amendment also makes clear what recruiting policies and practices do not trigger the statute's bar on funding. To remain eligible for funding, an institution need not grant military recruiters access on more favorable terms than other employers. As Petitioners flatly admitted in the court below, the "Solomon Amendment does not demand preferential access for military recruiting." Br. for Appellees at 34, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433).[3]

---

[3] The Solomon Amendment is not the only federal statute in which the phrase "at least equal" appears. In the Telecommunications Act of 1996, Congress used similar language to the Solomon Amendment, and required that local phone companies provide competitors certain services at a level "at least equal in quality" to the level at which the local phone companies provided those services to themselves. 47 U.S.C. § 251(c)(2)(C) (2005). The Eighth Circuit ruled that this language "mandate[d] only that the quality be *equal – not superior.*" *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997) (emphasis added), *rev'd on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The court there struck down as "violat[ing] the plain terms of the Act" an FCC rule requiring incumbent local phone companies to provide competing carriers with services "superior to those levels at which the incumbent [local phone companies] provide these services to

(Continued on following page)

The text of the Solomon Amendment thus permits an institution to apply to military recruiters policies that are applied without exception to all other employers and with which *all* employers must comply to gain access for recruiting purposes.[4] For example, the Solomon Amendment does not prohibit federal funding for an institution that charges the military the same reasonable administrative fee to participate in school-sponsored recruiting programs that it charges other employers. *Cf.* 32 C.F.R. § 216.4(e), (f)(2) (2005) (providing that the military will pay an institution's "actual costs" for "providing military recruiters access to student recruiting information" so long as those costs are "reasonable and customary"). Similarly, an institution that receives federal funding may, consistent with the Solomon Amendment, apply to military recruiters other placement office policies applicable to all other employers, such as rules against pre-screening interested students, rules against contacting students prior to school-sponsored interviews, and rules setting the time and place of interviews.

---

themselves." *Id. See also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("The phrase 'at least equal in quality' establishes a minimum level[;] . . . it does not require anything more."), *rev'd on other grounds by Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *MCI Telecomms. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 506 (N.D.N.Y. 2001) ("While the phrase 'at least equal in quality' leaves open the possibility that [entities] may agree to provide [service] that [is] superior in quality to that provided to itself and others, it establishes a floor below which the quality of [service] may not go.").

[4] It is undisputed, *see Forum for Academic and Institutional Rights*, 390 F.3d at 224 n.2, that the nondiscrimination policies at issue here are applied evenhandedly to all employers, and that "the schools refuse to assist *any* employer that declines" to comply. *Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 281 (D.N.J. 2003) (emphasis added).

Put simply, nothing in the statutory language authorizes the Secretary of Defense to pick and choose which of the institution's policies military recruiters will comply with. Petitioners have consistently admitted as much in this action. *See, e.g.*, Pets. Br. at 35 (Institutions can restrict military recruiters and can "continue to receive federal funding as long as they treat other recruiters the same."); Br. for Appellees at 36, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (Solomon Amendment permits institutions to place "equivalent limits on military and non-military recruiters.").

The text and structure of the Solomon Amendment make clear how the statute's equality requirement is to be measured and confirm as proper the reading of the statute set forth above. As Judge Easterbrook has put it, "[e]quality is an open term. . . . Equal *with respect to what* is the essential question." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors' Ass'n*, 814 F.2d 358, 367 (7th Cir. 1987) (emphasis in original). The answer to this question – *equal with respect to what?* – cannot come from the equality requirement itself. It "must come from some independent source." *Id.* What satisfies the Solomon Amendment's demand for equality between military and non-military recruiters? The answer turns on the relevant criteria for determining that equality. If equality is measured in terms of treatment, then an evenhandedly applied policy applicable to all employers provides equality to all who are subject to it. By contrast, if equality is measured in terms of outcomes (or, as the Government has put it in a different case, "actual access," Defendant's Supplemental Memorandum Concerning Amendment to 10 U.S.C. § 983 ("Supplemental Memorandum") at 4, *Burt v. Rumsfeld*,

354 F. Supp. 2d 156 (D. Conn. 2005)), then a universally applicable recruiting policy (*e.g.*, requiring the payment of administrative fees or a certification of nondiscrimination) that has the effect of limiting the participation of recruiters who fail to comply provides unequal access. The Solomon Amendment, however, cannot reasonably be construed as making federal funding turn on equality of outcomes ("actual access") regardless of universally applicable policies.

In the text of the Solomon Amendment, Congress provided the criteria – the "independent source," as Judge Easterbrook would have it, *Premier Elec. Constr. Co.*, 814 F.2d at 367 – for the measurement of the requisite equality. All that is required is that military recruiters be permitted to gain access to campuses and students "in a manner" at least equal to non-military recruiters. The phrase "in a manner" indicates that the *process or way in which the military gains access* to campuses and students on campuses must be equal to all other employers. *See* Webster's Third New International Dictionary of the English Language Unabridged 1376 (1993) (defining manner as "the mode or method in which something is done or happens; a mode of procedure or way of acting"); The American Heritage College Dictionary 825 (3d ed. 1993) (defining manner as "[a] way of doing something or the way in which a thing is done or happens"); 9 Oxford English Dictionary 323-24 (2d ed. 1989) (defining manner as "[t]he way in which something is done or takes place; method of action; mode of procedure"). By providing that the relevant measure of equality is equality in the process or way in which the military gains access, the statute has created a sensible scheme of equal treatment under universally applicable recruitment procedures in which

military recruiters may not be singled out for unfavorable treatment.

Indeed, to construe the Solomon Amendment as requiring equality of outcomes or "actual access" is to read out of the statute the phrase "in a manner." Giving effect to that phrase as more than mere surplusage requires that the statute be construed as adopting equal treatment rather than equal outcome as its criteria of equality. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) (noting as "the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Moreover, construing the statute to require equal treatment rather than equal outcomes comports with the "'ordinary or natural meaning'" of the statutory words in question. *Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)); *see also Smith*, 508 U.S. at 241-42 (Scalia, J., dissenting); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 109-11 (2001). A moviegoer "gain[s] access" to a theater to watch a movie "in a manner that is at least equal" to all other moviegoers only if the moviegoer purchases a ticket, and abides by the theater's policy not to smoke inside the theater. The moviegoer's refusal or inability to pay for a ticket and abide by the theater's non-smoking policy does not mean that the theater has "prohibit[ed] or in effect prevent[ed]" the moviegoer from "gaining access" to watch the movie "in a manner that is at least equal" to that of any other moviegoer. Likewise, to "gain access" to an airline flight, all passengers must comply with the mandated security screenings. If a potential passenger declines to so comply,

that passenger will not be boarded. The refusal to board such a passenger, however, does not mean that the airline has "prohibit[ed] or in effect prevent[ed]" the passenger from "gaining access" to the flight "in a manner that is at least equal" to that of all other passengers. So, too, for educational institutions under the Solomon Amendment as Congress wrote that statute: requiring all employers to comply with the institution's recruiting policies, including nondiscrimination policies, provides all employers access on equal terms and conditions. To read the Solomon Amendment as exempting the military from such policies is to grant the military not equality but, rather, precisely the preferential access that Petitioners admit the statute does *not* require. *E.g.*, Br. for Appellees at 34, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) ("Solomon Amendment does not demand preferential access for military recruiting.").

Only by adopting the equal treatment construction of the statute can this Court avoid the conclusion that the Solomon Amendment gives the military the authority to pick and choose which recruiting policies it will follow. In a similar case challenging the Solomon Amendment, the Government argued (and the district court found) that equivalence under the Solomon Amendment is measured by outcomes ("actual access"). Supplemental Memorandum at 4; *Burt*, 354 F. Supp. 2d at 173 (D. Conn. 2005).[6] The

[6] In the *Burt* proceeding, defendant has filed a notice of appeal in the Court of Appeals for the Second Circuit and the plaintiff has filed in this Court a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit before judgment. *See* Pet. for Cert., *Burt v. Rumsfeld*, No. 04-1434.

consequence of such a construction, however, is to undo all evenhanded recruitment policies to which a Secretary of a military department declines to agree, including interview schedules, limitations on student contact, registration fees, and the like. Indeed, the Government's position before the district court in *Burt* was that an institution fails to comply with the Solomon Amendment if it does not permit the military to participate in school-sponsored recruiting programs, "regardless of the asserted reason for the exclusion." Supplemental Memorandum at 5; *see also Burt*, 354 F. Supp. 2d at 173 (statute requires more than the military be given "the same opportunity" to participate in recruiting programs). Congress, however, "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (finding it "implausible" that Congress would have extended broad powers to an agency "through . . . modest words"); *see also FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 159 (2000) ("In extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."). Therefore, the "modest words" of the Solomon Amendment should not be construed to provide the military with the broad preferences and exemptions the Government claimed in *Burt*. Indeed, measuring equality under the statute according to outcomes rather than treatment would convert the Solomon Amendment into precisely the power for the military to pick and choose among recruitment policies that Petitioners properly and expressly reject in this action. *See, e.g.*, Pets. Br. at 18 (Solomon Amendment requires "the federal government should be given an *equal opportunity to recruit*.") (emphasis added).

It would be extraordinary if the Solomon Amendment – almost alone among federal equality norms – requires equal outcomes rather than equal treatment. *Cf. Washington v. Davis*, 426 U.S. 229, 245-48 (1976) (holding that neutral criteria in government employment did not violate the Equal Protection Clause despite disparate impact on members of certain race); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) (holding that neutral criteria in state employment did not violate the Equal Protection Clause despite disparate impact on women). The statute's requirement that the military gain access "in a manner" that is equal, along with the consequences that would follow from construing the statute to require equal outcomes, indicates Congress has done no such thing in enacting the Solomon Amendment.

B. The History of the Solomon Amendment Supports the Interpretation that the Statute Was Not Intended to Apply to Even-handed Policies and Practices

As this Court has "repeatedly held, the authoritative statement" of the meaning of a statute "is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005). "With a plain, nonabsurd meaning" of the Solomon Amendment "in view," *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004), the Court need not consider the statute's legislative history. Rather, the Court "prefer[s] the plain meaning since that approach respects the words of Congress. In this manner [the Court] avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* at 536.

With regard to the Solomon Amendment, "nothing in the legislative history indicates directly and explicitly that Congress understood," *Allapattah Servs.*, 125 S. Ct. at 2627, that the statute would apply to an institution's evenhandedly administered recruitment policies applicable to all employers. Rather, although perhaps somewhat "murky" and "ambiguous," *id.* at 2626, the history of the Solomon Amendment does demonstrate that the provision was directed solely at policies and practices that discriminate against military recruiters.

The original ancestor of the current Solomon Amendment was enacted in 1968, against the backdrop of universities registering their disapproval of the Vietnam War by refusing to allow military recruiters on campus. That legislation directed NASA, absent a waiver, to withhold financial grants to institutions that "barred military recruiters from their campuses." Pets. Br. at 3 (citing National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 281).

By 1994, Congress believed, *see* 140 Cong. Rec. H3861, H3863 (daily ed. May 23, 1994) (statements of Rep. Solomon and Rep. Pombo, respectively), that waivers had been granted so generously that the then-current legislation no longer served its purpose of withholding Pentagon funding from schools that "barred military recruiters from campus." *See* Pets. Br. at 3. Rather than fundamentally change the statutory framework, however, Congress decided "simply . . . [to enforce] existing law." 140 Cong. Rec. at H3862 (statement of Rep. Solomon). The Solomon Amendment, enacted in October 1994, substantially reproduced the 1968 legislation while curtailing the Secretary of Defense's power to grant waivers. National Defense Authorization Act for Fiscal Year 1995, Pub. L.

No. 103-337, Div. A, Title V, Subtit. E, § 558, 108 Stat. 2776 (1994); *see also* Pets. Br. at 3-4.

The Department of Defense subsequently promulgated regulations to implement the 1994 Solomon Amendment. The regulations for the 1994 statute indicated that universally applicable policies and practices that were evenhandedly applied did not provide a basis for the Government to withhold the specified funding. For example, that portion of the Solomon Amendment currently codified at 10 U.S.C. § 983(b)(2) provides that the Secretary may withhold funds from an institution that "prohibits or in effect prevents access by military recruiters" to certain "information pertaining to students." In its regulations, however, the Department has recognized that when a student "opt[s]-out" of the release of "directory information" an institution of higher education "will not be considered . . . to have denied access" under the Solomon Amendment if the "student 'opt-outs' from the disclosure of directory information . . . are *evenhandedly applied to all prospective employers* seeking information for recruiting purposes." *Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education*, 63 Fed. Reg. 56,819, 56,820 (Oct. 23, 1998) (codified at 32 C.F.R. pt. 216) (emphasis added); *see* 32 C.F.R. § 216.4(c)(5) (exempting institutions that certify that "each student concerned has formally requested the covered school to withhold this information from third parties").

Indeed, in a "sample letter" that was included in the regulations, the Department of Defense expressly confirmed that the 1994 Solomon Amendment applied solely to an institution's disparate treatment of the military. That sample letter, which is used to verify an institution's policy regarding recruiting by the military, *Military*

Recruiting, 63 Fed. Reg. at 56,823 (final rule codified at 32 C.F.R. § 216.5(b)(2)), requests institutions of higher education to "highlight *any difference* between access for military recruiters and access for recruiting by other potential employers." *Id.* at 56,824, Appendix A to 32 C.F.R. pt. 216 (emphasis added).

In October 2004, Congress amended the Solomon Amendment to add the requirement that specified federal funds be conditioned on allowing military recruiters to gain access to campuses or access to students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." The limited legislative history of the 2004 amendment that bears on the question suggests that Congress sought merely to ensure that the military not be discriminated against vis-à-vis other employers. The Senate Armed Services Committee stated that the 2004 amendment was addressed to "incidents of *unequal treatment* of military recruiters at certain colleges and universities." S. Rep. No. 108-260, at 330 (May 11, 2004) (referring S. 2400 to full Senate) (emphasis added).

Similarly, in the House, Representative Cox, a cosponsor of H.R. 3966,[6] emphasized that the scope of the 2004 amendment was limited to discrimination against the military: "The premise of the bill is a simple one:

---

[6] Although there was no debate regarding the 2004 amendment during the passage of the House, Senate, and Conference Committee versions of the 2005 Defense appropriations bill, there was extensive debate in the House on H.R. 3966 which had text identical to the final provision. H.R. 3966 passed the House by a vote of 338-86 on March 30, 2004, 150 Cong. Rec. at H1711-12, but died in committee in the Senate after an identical provision was inserted in the FY 2005 Defense appropriations bill.

Colleges that *discriminate against* the United States Armed Services should not receive U.S. taxpayer funds related to national defense and homeland security.' 150 Cong. Rec. H1707 (daily ed. Mar. 30, 2004); *see also id.* at H1711 (statement of Rep. Rogers, main sponsor of H.R. 3966) (noting that the bill "would ensure nothing more than fair and *equal treatment* of recruiters"); *id.* at H1708 (statement of Rep. Cox) (Harvard University "faculty voted to *ban the military* from campus in protest to the Vietnam War and that ban has been in place ever since.") (all emphases added).[7]

Accordingly, to the extent that the Court finds the legislative history or other extrinsic materials relevant – and Amici believe they are not in light of the text of the statute – those materials confirm that only those policies that are not "evenhandedly applied to all prospective employers," *Military Recruiting*, 63 Fed. Reg. at 56,820, violate the requirement of the Solomon Amendment. The legislative history described here confirms that the Solomon Amendment's language requires only equality in treatment, not equality in outcomes. *See* Section I.A.

---

[7] To be sure, in "'their zeal to defeat'" the 2004 amendment, its opponents "'understandably . . . overstate[d] its reach,'" *Bryan v. United States*, 524 U.S. 184, 196 (1998) (quoting *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964)), in suggesting that the amendment would require an institution to waive, as to military recruiters, that institution's evenhanded policies. *See, e.g.*, 150 Cong. Rec. H1710 (daily ed. Mar. 30, 2004) (statement of Rep. Farr). As this Court, however, has long recognized, "'[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *Bryan*, 524 U.S. at 196 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)); *accord, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

supra. Thus, the legislative history supports the reading of the statute that permits the application of universally applicable nondiscrimination policies to military recruiters.

II. THE INTERPRETATION OF THE STATUTE OFFERED BY THE DEPARTMENTS OF THE MILITARY IS NOT ENTITLED TO DEFERENCE

The Solomon Amendment provides that specified funds may not be provided to an institution of higher education "if the Secretary of Defense determines" that the institution has a policy or practice which fails to satisfy the Amendment's equality requirement. Nonetheless, the Department of Defense letters to various law schools, *see, e.g.*, J.A. at 128-33, which purport to interpret what that equality requirement is, are not entitled to any deference under either *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

First, the Solomon Amendment "speaks clearly to the issue at hand." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing *Chevron*, 467 U.S. at 843); *accord Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). Because construing the equality mandate of the Solomon Amendment to require equal outcomes or actual access – rather than equal treatment – would authorize the Secretary of Defense to stop federal funding to institutions of higher education whenever a Secretary of a military department declined to comply with such an institution's recruitment policy, *see* Section I.A. *supra*, the only reasonable construction of the Solomon Amendment is one that permits the application of universally applicable nondiscrimination

policies to military recruiters. Even if the military had adopted a formal interpretation of the Solomon Amendment's equality requirement, the unambiguous text of the statute would have mandated an interpretation requiring only equal treatment, not equal outcomes. *Cf. Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 600.

Second, the Government in *Burt* expressly admitted that the letters to the various law schools did not constitute final determinations by the military as to the scope of the Solomon Amendment. *See, e.g.*, Def.'s Mot. to Dismiss Pls.' Compl. at 2, *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005).

Third, any purported interpretation of the statute set forth in the letters was "'not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.'" *United States v. Mead Corp.*, 533 U.S. 218, 254 (2001) (Scalia, J., dissenting) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). Thus, the Department of Defense letters, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587.

Finally, the military Departments' letters also lack the indicia this Court has identified as bearing upon such a pronouncement's "power to persuade." *Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140). The Government, for example, has adopted inconsistent positions on the critical issue of the proper construction of the Solomon Amendment. Although the military took a contrary stance in *Burt*, Supplemental Memorandum at 5, Petitioners have consistently adopted the view in this

action that the Solomon Amendment does *not* authorize the military to pick and choose the recruiting policies with which the military will comply. *See, e.g.*, Pets. Br. at 35 (Institutions can restrict military recruiters and can "continue to receive federal funding as long as they treat other recruiters the same."); Br. for Appellees at 36, *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433) (Solomon Amendment permits institutions to place "equivalent limits on military and non-military recruiters.").

The interpretations of the Solomon Amendment offered in the Department of Defense letters are also inconsistent with the Department's prior interpretation that evenhanded policies applicable to all employers are outside the scope of the Solomon Amendment. *Compare* J.A. at 128-33 (construing generally applicable policies as inconsistent with the Solomon Amendment's equality requirement), *with Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 282 (D.N.J. 2003) (citing 1998 letter from Department of the Army recognizing that, although USC did not exempt the Army from its nondiscrimination policy, "USC Law's career services office 'provid[ed] . . . military recruiters a degree of access to students that is equal in quality and scope to that afforded other employees' "). The military's recent letters are devoid of any evidence that the Solomon Amendment's relationship to generally applicable recruitment policies was thoroughly considered. Indeed, the letters do not attempt to justify the validity of the Department's reasoning, but rather rely solely upon an *ipse dixit* conclusion about the meaning of the Solomon Amendment's equality requirement.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE COUNSELS IN FAVOR OF CONSTRUING THE STATUTE SO AS NOT TO PASS ON A QUESTION OF CONSTITUTIONALITY

It is apparent from the decisions below, the *Burt* decision, and the briefs of the parties and the various amici that reading the Solomon Amendment to deny funding to institutions of higher education that evenhandedly apply universally applicable nondiscrimination policies to military recruiters raises "serious constitutional doubts." *Clark v. Martinez*, ___ U.S. ___, 125 S. Ct. 716, 724 (2005). Those doubts are only exacerbated in light of the observation this Court made in *Rust v. Sullivan*, 500 U.S. 173, 200 (1991), that the "Government's ability to control speech" by conditional grants of federal funding is more limited in "a traditional sphere of free expression" such as a university than elsewhere.

It is a "cardinal principle" of statutory construction that when there is "a serious doubt" as to the constitutionality of an Act of Congress, the Court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Jean v. Nelson*, 472 U.S. at 854 (quoting *Spector Motor Serv.*, 323 U.S. at 105); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

latter."). Indeed, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Rust*, 500 U.S. at 191 (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). As the Court most recently explained, the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Martinez*, 125 S. Ct. at 724.[8]

Even without the canon of constitutional avoidance, the Solomon Amendment is clear and unambiguous. For the reasons set forth in Part I, the Solomon Amendment requires equality in the sense of equal treatment, not in the sense of equal outcomes or actual access. Yet, even if the question remained open as to what kind of equality the Solomon Amendment requires, the canon of constitutional avoidance counsels in favor of adopting the construction of the statute that avoids the "serious constitutional doubts," *Martinez*, 125 S. Ct. at 724, that would arise if the statute is construed to condition specified federal funding on an institution's agreement to grant special waivers to military recruiters.

---

[8] The canon of constitutional avoidance supplies a further reason not to defer to the interpretation of the Solomon Amendment's equality requirement offered in the military's letters to various law schools. *See* Part II *supra*. As the Court held in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), "where an otherwise acceptable [agency] construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

CONCLUSION

Congress could have enacted a statute purporting to prohibit the provision of specified federal funding to institutions of higher education absent special waivers of those institutions' nondiscrimination policies for military recruiters. Yet the constitutional questions that such a statute would raise are not before the Court for a simple reason – to date Congress has not enacted such a statute. Because in both word and practice the law school policies presently before the Court permit military recruiters to "gain[] access" in "a manner that is at least equal in quality and scope" to that provided all other employers, the Government has no basis under the Solomon Amendment to withhold funding from institutions of higher education that have adopted such policies. There is thus no need to decide whether the Constitution supports the issuance of the preliminary injunction entered by the court below. The preliminary injunction prohibiting Petitioners from withholding federal funding, or threatening to do so, because of an institution's universally applicable nondiscrimination recruitment policies should be affirmed because such policies do not violate the Solomon Amendment.

Respectfully submitted,

JONATHAN D. SCHILLER
Counsel of Record
DAVID A. BARRETT
GARY K. HARRIS
WILLIAM C. JACKSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., N.W.
Washington, D.C. 20015

Counsel for Amici Curiae

September 2005